



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
FREEDOM OF INFORMATION ACT BRANCH
Washington, D.C. 20570

Via email

March 24, 2023

Re: FOIA Request NLRB-2023-000914

Dear Micah Fry:

This is in response to your request, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, received on February 27, 2023, in which you seek all documents in *Durham School Services*, Case Nos. 19-CA-286161, 19-CA-286162, 19-CA-304149, 19-CA-307553, 19-CA-309304, 19-CA-310087, 19-CA-311457, 19-CA-311465, 19-CA-311627, and 19-CA-312429. You assumed financial responsibility for the processing in the amount of \$37.00.

We acknowledged your request on February 27, 2023.

Your request is denied in part and granted in part, as explained below.

After conducting a search of the Agency's electronic casehandling system, NxGen, I have confirmed that two of the requested cases are closed and are identified as being related to the other eight requested cases which are recently filed, open cases being investigated by the Agency's Region 19 office.

As such, I have determined that the investigatory case file records in these cases are exempt from disclosure pursuant to Exemption 7(A) of the FOIA. 5 U.S.C. § 552 (b)(7)(A). Exemption 7(A) allows an agency to withhold records included in an open investigatory file where disclosure could reasonably be expected to interfere with enforcement proceedings. See *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 236 (1978). Exemption 7(A) will apply even if a requested case is closed, if disclosure could reasonably be expected to interfere with a related, pending proceeding. 5 U.S.C. § 552 (b)(7)(A); See *New England Med. Ctr. Hosp. v. NLRB*, 548 F.2d 377, 385-86 (1st Cir. 1976); *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 236 (1978). This is because the FOIA is not intended to function as a private discovery tool. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. at 242. The protections of Exemption 7(A) extend to any record whose release would enable a respondent or potential respondent to tailor a defense or otherwise obtain an unfair litigation advantage by premature disclosure. See *Ehringhaus v. FTC*, 525 F. Supp. 21, 23-24 (D.D.C. 1980); *Swan v. SEC*, 96 F.3d 498, 499-500 (D.C. Cir. 1996). Moreover, the protection

applies until all reasonably foreseeable administrative and judicial proceedings conclude. See *Juarez v. Dep't of Justice*, 518 F.3d 54, 58-59 (D.C. Cir. 2008).

Here, specifically, notwithstanding that two of the requested cases are closed – Case Nos. 19-CA-286161 and 19-CA-286162, they are related to eight unfair labor practice cases currently being investigated by the Region 19 (Case Nos. 19-CA-304149, 19-CA-307553, 19-CA-309304, 19-CA-310087, 19-CA-311457, 19-CA-311465, 19-CA-311627, and 19-CA-312429). Consequently, FOIA Exemption 7(A) is applicable to protect the investigatory records in all of the requested cases, since disclosure of these records at this time could interfere with the related, pending investigations. Therefore, your request is denied to the extent that any investigatory records in the requested case files are being withheld in full pursuant to Exemption 7(A).

Your request is granted to the extent that I am providing the formal records in the requested cases, as they are releasable and available to the public pursuant to NLRB FOIA regulations regardless of the open/closed status of a case. The formal records from the requested cases at this time include the charges, docketing letters, any notices of appearances, and two Regional Director's letters approving the withdrawal in the two closed cases. Upon my review, redactions have been made to portions of these records to protect the privacy interests of individuals named in the records, pursuant to FOIA Exemption 6, which pertains to information the release of which would constitute a clearly unwarranted invasion of personal privacy, and FOIA Exemption 7(C), which pertains to records or information compiled for law enforcement purposes, the release of which could reasonably be expected to constitute an unwarranted invasion of personal privacy. 5 U.S.C. § 552(b)(6) and (b)(7)(C).

Please note that Exemption 7(A) protection is “temporal in nature.” *Citizens for Responsibility & Ethics in Wash. v. Dep't of Justice*, 746 F.3d 1082, 1097 (D.C. Cir 2014) (citing *NLRB v. Robbins Tire*, 437 U.S. 214, 223-24 230-32 (1978)). As such, additional case file records may become disclosable, subject to applicable exemptions, after the cases close, that is, once a Board decision and/or court order issues, there has been full compliance with a settlement, or the cases have otherwise been closed under Agency procedures. Accordingly, you may wish to file a new request at that time.

The status of the eight open cases can be tracked on the Agency website at www.nlr.gov by going to the Cases & Decisions tab, clicking case search, entering the case number in the search box and viewing the case page or by clicking the link here: <https://www.nlr.gov/case/19-CA-304149>; <https://www.nlr.gov/case/19-CA-307553>; <https://www.nlr.gov/case/19-CA-309304>; <https://www.nlr.gov/case/19-CA-310087>; <https://www.nlr.gov/case/19-CA-311457>; <https://www.nlr.gov/case/19-CA-311465>;

<https://www.nlr.gov/case/19-CA-311627>; and <https://www.nlr.gov/case/19-CA-312429>.

For the purpose of assessing fees, we have placed you in Category D, the “all other requesters” category, because you do not fall within any of the other fee categories. Consistent with this fee category, you will be assessed charges to recover the reasonable direct costs for searching for the requested records, except that you will not be charged for the first two hours of search. NLRB Rules and Regulations, 29 C.F.R. § 102.117(d)(2)(ii)(D). Charges for all categories of requesters are \$9.25 per quarter hour of professional time. 29 C.F.R. § 102.117(d)(2)(i).

Less than two hours of professional time was expended in searching for the requested material. Accordingly, there is no charge assessed for this request.

You may contact Joseph Mullaney, the Attorney-Advisor who processed your request, at (202) 273-3863 or by email at Joseph.Mullaney@nlrb.gov, as well as the Agency’s FOIA Public Liaison, for any further assistance and/or to discuss any aspect of your request. The FOIA Public Liaison, in addition to the Attorney-Advisor, can further explain responsive and releasable agency records, suggest agency offices that may have responsive records, and/or discuss how to narrow the scope of a request in order to minimize fees and processing times. The contact information for the Agency’s FOIA Public Liaison is:

Kristine M. Minami, FOIA Public Liaison
National Labor Relations Board
1015 Half Street, S.E., 4th Floor
Washington, D.C. 20570
Email: FOIAPublicLiaison@nlrb.gov
Telephone: (202) 273-0902
Fax: (202) 273-FOIA (3642)

After first contacting the Agency, you may additionally contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA dispute resolution services it offers. The contact information for OGIS is:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, Maryland 20740-6001
Email: ogis@nara.gov
Telephone: (202) 741-5770
Toll free: (877) 684-6448
Fax: (202) 741-5769

You may obtain a review of this determination under the NLRB Rules and Regulations, 29 C.F.R. § 102.117(c)(2)(v), by filing an administrative appeal with the Division of Legal Counsel (DLC) through FOIAonline at: <https://foiaonline.gov/foiaonline/action/public/home> or by mail or email at:

Nancy E. Kessler Platt, Chief FOIA Officer
National Labor Relations Board
1015 Half Street, S.E., 4th Floor
Washington, D.C. 20570
Email: DLCFOIAAppeal@nrlrb.gov

Any appeal must be postmarked or electronically submitted within 90 calendar days of the date of this letter. Any appeal should contain a complete statement of the reasons upon which it is based.

Please be advised that contacting any Agency official (including the Attorney-Advisor, FOIA Officer, or the FOIA Public Liaison) and/or OGIS does not stop the 90-day appeal clock and is not an alternative or substitute for filing an administrative appeal.

Sincerely,

/s/ Synta E. Keeling

Synta E. Keeling
FOIA Officer

Attachment: (154 pages)